87-1344

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

EDWIN MEESE III, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

v.

JACK ABBOTT, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

ROBERT H. KLONOFF
Assistant to the Solicitor General

ANDREW LEVCHUK
CURTIS E. HALL
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

76pp

QUESTION PRESENTED

Whether the court of appeals erred in holding that the constitutionality of prison regulations and policies governing the receipt of publications by federal prisoners should be evaluated under the strict scrutiny standard enunciated in *Procunier* v. *Martinez*, 416 U.S. 396 (1974).

PARTIES TO THE PROCEEDINGS

In addition to the petitioner named in the caption, the following were defendants in the district court and are petitioners in this Court: Elliott L. Richardson, Norman A. Carlson, Ralph A. Aaron, Noah Allredge, Marvin R. Hgan, George W. Pickett, Elwood O. Toft, Charles Campbell, P.J. Ciccone, Loren E. Daggett, James Henderson, Mason Holley, John J. Norton, Paul Walker, and Samuel J. Britton. Additional petitioners, who are defendants pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, are the current director of the Bureau of Prisons and the current wardens at various federal prisons: J. Michael Quinlan, John Sullivan, Calvin Edwards, Patrick W. Keohane, Gary Henman, Tom C. Martin, Charles Turnbo, Al Turner, Joseph Petrovsky, Robert Honstead, Dennis Luther, Roderick D. Brewer, and Robert Matthews.

In addition to the respondent named in the caption, the following were plaintiffs in the district court and are respondents in this Court: the Prisoners' Union, Weekly Guardian Associates, and the Revolutionary Socialist League.

In addition to the various claims for equitable relief, respondents' lawsuit also involves individual damage actions by 82 named plaintiffs. Those claims were severed by the district court in 1979; they have not yet been adjudicated and are not part of the present proceeding.

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The Solicitor General, on behalf of the Attorney General of the United States and all other petitioners, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-25a) is reported at 824 F.2d 1166. The opinion of the district court (App., *infra*, 26a-48a) is unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 50a-51a) was entered on July 28, 1987. A petition for rehearing was denied on October 13, 1987 (App., *infra*, 52a). On December 24, 1987, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 10, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION, REGULATIONS AND PROGRAM STATEMENT INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

The pertinent regulations and program statement—28 C.F.R. 540.70 and 540.71 and Bureau of Prisons Program Statement No. 5266.5 (Jan. 2, 1985)—are set forth, in relevant part, as an appendix to the court of appeals' opinion (App., *infra*, 22a-25a).

STATEMENT

This is a nationwide class action brought by federal prisoners in May 1973. The suit challenges the constitutionality of certain regulations and policies of the United States Bureau of Prisons (BOP) governing the receipt of publications by federal inmates. Numerous federal officials responsible for enforcing those regulations and policies were sued in both their official and individual capacities. In September 1978, the district court ordered the addition, as plaintiffs, of three publishers whose magazines had been rejected at federal prisons: the Prisoners' Union, Weekly Guardian Associates, and the Revolutionary Socialist League (App., *infra*, 2a). On September 13, 1984, following a 10-day bench trial, the district court entered an order upholding the challenged regulations and policies (*id.* at 26a-48a). The court of appeals reversed (*id.* at 1a-25a), holding that the district court had applied an erroneous standard of review, and that under the correct standard—strict scrutiny—the regulations were unconstitutional on their face.[1]

[1] In addition to resolving respondents' equitable claims involving restrictions on publications, the courts below also adjudicated respondents' challenges to various regulations restricting inmate correspondence. The district court enjoined petitioners from enforcing certain of those regulations, a ruling not appealed by the government, but it upheld the BOP's regulation governing inmate-to-inmate correspondence (App., *infra*, 34a-43a, 47a-48a). The court of appeals affirmed the latter ruling (*id.* at 3a-6a); accordingly, no issue involving inmate correspondence is raised in this petition. Similarly, no issue is raised with respect to individual damage claims brought by 82 named plaintiffs as part of this case. Those claims were severed by the district court in October 1979 (*id.* at 26a n.1) and are still pending.

1. a. Under the BOP's regulations, inmates are ordinarily entitled to "subscribe to or to receive publications without prior approval" (28 C.F.R. 540.70(a)).[2] A publication may be withheld from a prisoner only upon the decision of the warden (28 C.F.R. 540.70(b)), and only if the warden finds that the publication would be "detrimental to the security, good order, or discipline of the institution or [that] it might facilitate criminal activity" (28 C.F.R. 540.71(b)). The warden must review the individual publication before rejecting it; he may not simply establish "an excluded list of publications" (28 C.F.R. 540.71(c)). Moreover, the warden may not reject a publication "solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant" (28 C.F.R. 540.71(b)). Publications that a warden may reject include those that meet one of seven specified criteria.[3] The regulations also

[2] The regulations define "publication" as "a book (for example, novel, instructional manual), or a single issue of a magazine or newspaper, plus such other materials addressed to a specific inmate as advertising brochures, flyers, and catalogues" (28 C.F.R. 540.70(a)).

[3] Those criteria (with brackets reflecting portions that have not been challenged by respondents) are as follows (28 C.F.R. 540.71(b)):

> (1) [It depicts or describes procedures for the construction or use of weapons, ammunition, bombs or incendiary devices;]

contain procedures for providing notice and an explanation to the inmate if a publication is rejected and for enabling inmates and publishers to file administrative appeals.[4] Finally, although it is not set out in the regulations, the BOP's practice is that when any portion of a publication is deemed excludable, the entire publication is withheld (App., *infra*, 34a).

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(2) It depicts, encourages, or describes methods of escape from correctional facilities, [or contains blueprints, drawings or similar descriptions of Bureau of Prisons institutions;]

(3) [It depicts or describes procedures for the brewing of alcoholic beverages, or the manufacture of drugs;]

(4) [It is written in code;]

(5) It depicts, describes or encourages activities which may lead to the use of physical violence or group disruption;

(6) It encourages or instructs in the commission of criminal activity;

(7) It is sexually explicit material which by its nature or content poses a threat to the security, good order, or discipline of the institution, or facilitates criminal activity.

In addition to these criteria, the standards governing sexually explicit publications are contained in BOP Program Statement No. 5266.5 (Jan. 2, 1985) (see App., *infra*, 24a-25a).

[4] Under 28 C.F.R. 540.71(d), the warden must "promptly advise the inmate in writing of the decision [rejecting a publication] and the reasons for it." The notice must refer to "the specific article(s) or material(s) considered objectionable" (*ibid.*). The inmate shall be permitted to review the material for purposes of filing an administrative appeal (see 28 C.F.R. 542.15) "unless such review may provide the inmate with information of a nature which is deemed to pose a threat or detriment to the security, good order or discipline of the institution or to encourage or instruct in criminal activity" (28 C.F.R. 540.71(d)). The regulations also provide that the warden shall send a copy of the inmate's notice to the publisher or sender of the publication (28 C.F.R. 540.71(e)). Furthermore, the warden is required to "advise the publisher or sender that he may obtain an independent review of the rejection by writing to the Regional Director within 15 days of receipt of the rejection letter" (*ibid.*).

b. At trial, respondents presented the testimony of various present and former state correctional officials, correctional experts, and federal prisoners. Those witnesses offered their opinions concerning the need for the BOP's regulations at issue. In addition, respondents offered into evidence 46 publications that had been rejected at various federal prisons.

Petitioners introduced the testimony of several federal correctional officials, a state correctional official, and a social scientist who headed the BOP's training program. Those witnesses similarly offered their opinions concerning the need for the BOP's regulations.

At the conclusion of the trial, the district court took the case under advisement and directed the parties to submit proposed findings of fact and conclusions of law. On September 13, 1984, the court issued a lengthy opinion setting forth its findings of fact and conclusions of law. Based on the evidence at trial and the governing case law, the court held that the BOP's regulations and policies represented a reasonable response to legitimate penological concerns and were therefore constitutional (App., *infra*, 28a-32a, 43a-47a).

In its opinion, the court found that at higher-security federal prisons, "minimizing violence is a primary concern" (App., *infra*, 28a). The court noted that the problem has been "aggravated" in recent years by "the growth [in prisons] of ethnic gangs," which "engage in organized crime including extortion, drug activity, and homicide" (*ibid.* (footnote omitted)). In addition, the court indicated that homosexual behavior, while prohibited in federal prisons, is "widespread in the male prisons," and that "[m]any assaults on fellow inmates are precipitated by or manifested in homosexual activity" (*ibid.*).

Addressing the link between publications and security problems, the court found that "publications can present a

security threat" (App., *infra*, 31a). After summarizing the types of publications that have been rejected at federal prisons (*id.* at 29a),[5] the court noted that not only "racial publications but materials concerning prison management and prison life" frequently "speak in strident, inflammatory terms," and that "a warden might well find such publications too provocative for his institution at a given time" (*id.* at 31a). In addition, the court noted, "[o]ther publications too might be dangerous to have on hand in a particular facility" (*ibid.*). For example, "a sexual magazine * * * might be undesirable in an institution that has had a high incidence of sexual assault" (*ibid.*). According to the court, "[t]he possible dangerous situations are as various as publications and circumstances at given institutions" (*ibid.*).

The district court held that the BOP's regulations were reasonable because they were directed at "potentially volatile publications" and because they did not contain a "blanket ban" on publications but instead provided for a "case-by-case determination" of acceptability (App., *infra*, 47a). The court further held that, in light of the differences in circumstances at different times and among different institutions, the BOP was justified in adopting "a

[5] According to the court, such publications include "sexually explicit" publications, "non-explicit homosexual publications," publications that "preach ethnic superiority, such as the newsletter of the American Nazi Party," publications that "advocate the unionization of prisoners, highlight instances of alleged abuse by prison officials, or state grievances of prisoners generally," publications that "facilitate gambling by giving odds for the week's sporting events," publications relating to "self-defense," and "instructional materials on electronics and radio" (App., *infra*, 29a (footnote omitted)). The court stated that "[m]agazines and journals are not excluded by title but are reviewed on an issue-by-issue basis" (*ibid.*).

standard that gives the warden wide discretion" (*id.* at 31a).

The court rejected respondents' argument that under *Procunier* v. *Martinez*, 416 U.S. 396 (1974), the burden was on petitioner to show that the regulations furthered an important government interest and were not unnecessarily broad (App., *infra*, 43a-44a). The court pointed out that in several post-*Martinez* cases,[6] the Supreme Court had applied a more deferential standard – *i.e.*, whether there is a rational relationship between the prison regulations and legitimate penological objectives (*id.* at 44a-47a). The court noted (*id.* at 47a) that heightened scrutiny was not required simply because various publishers had joined in challenging the regulations. It reasoned that *Martinez* did not apply because, unlike in that case, "the rights of [the outsiders] are not 'inextricably meshed' with those of inmates" (*id.* at 46a & n.16 (quoting 416 U.S. at 409)). Moreover, the court found that the standard proposed by respondents, which required a " 'likely,' 'immediate,' or 'substantial' threat," could lead to the "admission of publications which, even if they did not lead directly to violence, would exacerbate tensions and lead indirectly to disorder" (App., *infra*, 32a (footnote omitted)).

The court also rejected respondents' contention that the reasons given by prison officials for rejecting the 46 publications introduced at trial were not sufficiently clear or precise (App., *infra*, 32a-33a). The court noted that, while the reasons given did not refer to specific prison risks, the government's witnesses "testified * * * that it is unwise to inform inmates of conditions that cause security

[6] *Pell* v. *Procunier*, 417 U.S. 817 (1974); *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977); *Bell* v. *Wolfish*, 441 U.S. 520 (1979).

concerns in the warden" (*id.* at 33a). Finally, the court upheld the BOP's policy of rejecting an entire publication if a portion is found to be excludable (*id.* at 34a).

2. The court of appeals reversed the district court and held that the challenged portions of the BOP's publication regulations were unconstitutional on their face (App., *infra*, 6a-21a). While the court did not dispute the district court's finding that the regulations passed muster under a reasonableness standard, the court held that, because the case deals "with some aspect of the First Amendment rights of a non-inmate, and * * * with the expression of ideas on paper," the strict scrutiny standard adopted in *Martinez* was the governing standard (*id.* at 7a-8a). The court found that this Court's post-*Martinez* decisions applying a more deferential standard were distinguishable because those cases dealt with "conduct within the prison, rather than the content of expression" (*id.* at 12a).

The court stated that, under *Martinez*, the proper test was whether a publication "encourage[s] conduct which would constitute, or otherwise [is] likely to produce, a breach of security or order or an impairment of rehabilitation" (App., *infra*, 20a). The court found that the BOP's regulations were deficient under that test because they permitted "a far looser causal nexus between expression and proscribed conduct" (*id.* at 15a). The court also struck down the BOP's policy of withholding an entire publication if a portion is deemed excludable (*id.* at 16a-17a).

The court remanded the case to the district court to rule, under a strict scrutiny standard, on whether the BOP had acted lawfully in rejecting the 46 publications that respondents had introduced at trial (App., *infra*, 21a).[7]

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[7] The court noted that, because some of the rejections occurred in 1977, "the district court should determine whether and to what extent the individual rejections are moot" (App., *infra*, 21a). In addition, the court of appeals analyzed, for illustrative purposes, the reasons given by wardens for rejecting five of the publications at issue. The court held that, in each case, the statements could not "be deemed findings of an adequate causal nexus between a rejected publication and a breach of security or order or interference with rehabilitation" (*id.* at 17a-20a).

REASONS FOR GRANTING THE PETITION

The court of appeals has seriously erred in holding that the BOP's regulations are subject to strict scrutiny review. In a line of cases culminating most recently in *O'Lone* v. *Estate of Shabazz*, No. 85-1722 (June 9, 1987), and *Turner* v. *Safley*, No. 85-1384 (June 1, 1987), this Court has made clear that a prison regulation that impinges on a prisoner's constitutional rights is valid if it is " 'reasonably related to legitimate penological interests' " (*Shabazz*, slip op. 5-6 (quoting *Turner*, slip op. 9)). In rejecting that standard, the court of appeals relied entirely on this Court's decision in *Procunier* v. *Martinez*, 416 U.S. 396 (1974). But as we explain below, *Martinez* was a narrow decision based on the substantial impact of particular regulations on the rights of a unique category of nonprisoners. That decision is not applicable in the present case, which involves at best an incidental impact on publishers. Indeed, this Court has declined to apply the *Martinez* standard in every subsequent case raising a challenge to prison regulations. See *O'Lone* v. *Estate of Shabazz, supra; Block* v. *Rutherford*, 468 U.S. 576 (1984); *Bell* v. *Wolfish*, 441 U.S. 520 (1979); *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977); *Pell* v. *Procunier*, 417 U.S. 817 (1974); cf. *Turner*, slip op. 13-14, 17 (applying deferential standard to regulations governing inmate-to-inmate correspondence but leaving open question whether *Martinez* applies to regulations restricting marriages between inmates and outsiders).

The present case is of great practical significance to the BOP because of its effect on the already difficult job of administering the federal prison system. As this Court recently recognized, "[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration" (*Turner*, slip op. 9). The district court in the present case specifically found as a factual matter that publications can threaten prison security even when prison officials cannot justify rejection under a strict scrutiny standard (App., *infra*, 32a). Furthermore, because this is a nationwide class action involving all federal prisoners, the BOP will not have the opportunity to seek "adjudication by a number of different courts and judges." *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979). The court of appeals' decision, if not overturned, will apply to every federal prison in the country. For these reasons, review by this Court is plainly warranted.

1. This Court has recognized that "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the Legislative and Executive Branches of Government" (*Turner* , slip op. 5). An "essential" objective in running a prison is "maintaining institutional security and preserving internal order and discipline" (*Wolfish*, 441 U.S. at 546). To carry out that goal, prison officials must be given "wide-ranging deference" in pursuing legitimate penological concerns (*Prisoners' Union*, 433 U.S. at 126). Judicial deference is essential "not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge" (*Wolfish*, 441 U.S. at 548), but also because of "separation of

powers concerns" (*Turner*, slip op. 5). In addition, deference is appropriate because of the unique characteristics of penal institutions. Prisons are "closed societies populated by individuals who have demonstrated their inability, or refusal, to conform their conduct to the norms demanded by a civilized society" (*Prisoners' Union*, 433 U.S. at 137 (Burger, C.J., concurring)). For that reason, "rules far different from those imposed on society at large must prevail within prison walls," and judges "are not equipped by experience or otherwise to 'second guess' the decisions" of legislators or administrators "except in the most extraordinary circumstances" (*ibid.*).

In recognition of these principles, this Court has stated that, while "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison" (*Wolfish*, 441 U.S. at 545), imprisonment " 'brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.' " *Shabazz*, slip op. 5 (quoting *Price* v. *Johnston*, 334 U.S. 266, 285 (1948)). The Court has therefore refused, "even where claims are made under the First Amendment, to 'substitute [its] judgment on * * * difficult and sensitive matters of institutional administration' for the determinations of those charged with the formidable task of running a prison" (*Shabazz*, slip op. 10 (citation omitted)). Under this Court's decisions, "prison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights" (*id.* at 5, citing *Prisoners' Union*, 433 U.S. at 128).

Only once has this Court applied heightened scrutiny in ruling on First Amendment challenges to prison regula-

tions. In *Procunier* v. *Martinez*, 416 U.S. 396 (1974), the Court struck down prison regulations restricting correspondence between inmates and outsiders. The Court held that strict scrutiny was required in that case because the First Amendment rights of nonprisoners were involved (*id.* at 408, 413-414). The decision, however, was a very narrow one. The Court emphasized that the outsiders had a special interest in communicating with specific prisoners (*id.* at 408). To illustrate the point, the Court noted that "[t]he wife of a prison inmate who is not permitted to read all that her husband wanted to say to her has suffered an abridgment of her interest in communicating with him as plain as that which results from censorship of her letter to him" (*id.* at 409).

Significantly, the Court in *Martinez* stated that the decision in that case applied only to "direct personal correspondence between inmates and those who have a particularized interest in corresponding with them" (*id.* at 408 (footnote omitted)). The Court noted that "[d]ifferent considerations may come into play in the case of mass mailings" (*id.* at 408 n.11), and it "intimate[d] no view" as to the proper resolution of that issue (*ibid.*), which is the issue presented in this case.

2. In the present case, the court of appeals concluded that the *Martinez* standard was controlling, despite the *Martinez* Court's refusal to extend its analysis to cases such as this one. According to the court of appeals (App., *infra*, 7a-8a), *Martinez* is dispositive because both that case and this one "deal with some aspect of the First Amendment rights of a non-inmate, and both deal with the expression of ideas on paper and not with conduct qua expression." Contrary to the court's holding, however, *Martinez* is not controlling here. In relying on *Martinez* and paying insufficient attention to the Court's later decisions, the court of appeals "got off on the wrong foot * * * by

not giving appropriate deference to the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement" (*Prisoners' Union*, 433 U.S. at 125).

The court of appeals' distinction between "the expression of ideas on paper" and "conduct qua expression" finds no support in this Court's decisions. This Court has stated in no uncertain terms that all claims by inmates that prison regulations violate their constitutional rights must be reviewed under a reasonableness standard. See *Shabazz*, slip op. 5-6; *Turner*, slip op. 9. Indeed, several cases applying a reasonableness test clearly involve restrictions on "the expression of ideas on paper." See *Turner* v. *Safley, supra* (upholding restrictions on inmate-to-inmate correspondence); *Jones* v. *North Carolina Prisoners' Labor Union, supra* (upholding, inter alia, the receipt by prisoners of bulk mailings about unions); *Bell* v. *Wolfish, supra* (upholding rule restricting prisoners' receipt of hardback books, except where such books are mailed directly from publishers, book clubs, or book stores). We know of no decision by this Court that supports the court of appeals' conclusion that heightened scrutiny applies in reviewing prison regulations simply because ideas expressed on paper are involved.

The court of appeals is equally incorrect in holding that, under *Martinez*, strict scrutiny is required because the rights of nonprisoner publishers are involved. To begin with, there is a critical distinction between the rights at stake in *Martinez* and those of the outsiders here. *Martinez* involved personalized correspondence from individuals, such as family members and friends. Substantial restrictions on such correspondence would greatly undermine the ability of the outsider to communicate with an inmate. In the case of publishers, however, the "rights"

at stake are far less substantial. Unlike correspondents, a publisher and a reader do not engage in "personal" communication (*Martinez*, 416 U.S. at 408), and a publisher has no "particularized interest" (*ibid.*) in distributing its publication to any individual reader. Moreover, the regulations at issue affect publishers in only the most indirect way. They do not prohibit a publisher from printing a particular article or distributing it to the general public. Rather, out of a universe of potential readers, the regulations simply reduce the potential audience for a particular issue of a publication by preventing a specific institution from receiving it at a particular time. The court of appeals did not even attempt to explain how the interests of the publishers are comparable to the interests of the nonprisoners in *Martinez*.

Moreover, this Court's post-*Martinez* decisions refute the suggestion that an impact on outsiders, however indirect, triggers strict scrutiny review. In numerous cases, the Court has upheld prison restrictions under a deferential standard of review, even though the constitutional rights of outsiders were involved. For example, in *Block* v. *Rutherford, supra*, the Court upheld a blanket prohibition on contact visits on the ground that there was a "valid, rational connection" between the ban and the "internal security of a detention facility" (468 U.S. at 586). Significantly, the respondent in that case, relying on *Martinez*, had argued for heightened scrutiny on the ground that the rights of outsiders were involved (*Rutherford* Resp. Br. 32). Similarly, in *Pell* v. *Procunier, supra*, the Court applied a reasonableness standard and upheld a regulation prohibiting face-to-face media interviews with individual inmates. That regulation, of course, had a direct and immediate impact on members of the press and the public at large. And in *Shabazz*, the Court upheld work assignment rules that had the effect of preventing in-

mates from attending a weekly Muslim congregational service held at the prison. As petitioners' brief in *Shabazz* revealed (at 17), that religious service was performed by an outside Islamic minister who came into the facility for that purpose. The restriction on the rights of prisoners to attend the service thus implicated the free exercise rights of the minister, and it similarly implicated the concerns of the nonprisoner Islamic community, whose members undoubtedly have an interest in ensuring that fellow Muslims be permitted to worship in accordance with the dictates of their religion (see *Shabazz* Amicus Br. for Imam Jamil Abdullah Al-Amin, *et al.* 2)).[8] Clearly, all of these cases involved regulations that affected the rights of nonprisoners; yet, in each case the Court applied a deferential standard rather than the "strict scrutiny" test applied in *Martinez*.[9]

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[8] Althought the court of appeals purported to deal with all of this Court's post-*Martinez* decisions, it did not discuss, or even cite, the Court's decision in *Shabazz*, which had been rendered six weeks earlier.

[9] The court of appeals noted (App., *infra*, 8a n.1 (citing cases)) that a number of courts, when faced with a similar issue in the context of state prisons, have applied the *Martinez* standard. But those cases are not helpful in resolving the present controversy. All of the cases cited by the court were rendered prior to this Court's decisions in *Turner* and *Shabazz*. The circuit court decisions cited by the court of appeals do not appear to rely on the rights of outsiders; their holdings are apparently based entirely or primarily on the rights of prisoners. See, *e.g.*, *Abdul Wali* v. *Coughlin*, 754 F.2d 1015, 1030 (2d Cir. 1985) (applying *Martinez* "to resolve cases involving an inmate's right to receive publications"). As noted, however, in light of *Turner* and *Shabazz*, it is clear that the rights of prisoners must be assessed under a reasonableness standard. See generally *Shabazz*, slip op. 6 n.* (rejecting analytical approach taken in *Abdul Wali*). Moreover, the district court decisions cited by the court of appeals either do not refer to the rights of outsiders or do so without any real analysis. And as the court

In addition, the court of appeals erred by treating prisons as if they were public forums, when they "most emphatically" are not (*Prisoners' Union*, 433 U.S. at 136; see also *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)). In a non-public forum, outsiders have no generalized right to engage in First Amendment activity. See, *e.g.*, *Greer* v. *Spock*, 424 U.S. 828, 838-840 (1976) (upholding regulations prohibiting demonstrations and partisan political speeches on military bases and barring distribution of publications deemed clearly detrimental to the functioning of the base); *Adderley* v. *Florida*, 385 U.S. 39, 47-48 (1966) (rejecting argument that demonstrators have First Amendment rights to speak and protest within a jail facility); cf. *Hazelwood School District* v. *Kuhlmeier*, No. 86-836 (Jan. 13, 1988), slip op. 6 (noting that "public schools do not possess all of the attributes of streets, parks, and other

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of appeals acknowledged, there is language in various Fifth Circuit cases that the standard applicable to regulations governing publications may be lower than the *Martinez* standard (see App., *infra*, 8a n.1 (citing cases)).

In *Brooks* v. *Seiter*, 779 F.2d 1177 (1985), a case not cited by the court of appeals, the Sixth Circuit discussed the rights of nonprisoner publishers, noting that it could "perceive no principled basis for distinguishing publications specifically ordered by a prison inmate from letters written to that inmate for purposes of first amendment protection" (*id.* at 1181). According to the court, "[t]he sender's interest in communicating the ideas in the publication corresponds to the recipient's interest in reading what the sender has to say" (*id.* at 1180). In our view, that analysis is erroneous; as noted, there are important differences between personal correspondence and publications. In any event, the Sixth Circuit did not explicitly adopt a strict scrutiny standard, but simply held that the district court had erred in dismissing an inmate's complaint. Indeed, the court quoted *Wolfish* for the proposition that prison officials must be given " 'wide-ranging deference' " in executing policies they deem necessary for prison security (*id.* at 1181 (quoting 441 U.S. at 547)).

traditional public forums"). Furthermore, in a non-public forum, distinctions that "may be impermissible in a public forum" are "inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended use of the property" (*Perry*, 460 U.S. at 49). Under this Court's forum cases, since the BOP's regulations at issue seek to limit the publishers' rights to distribute publications in the non-public forum of a prison, they pass constitutional muster if they are "reasonable in light of the purpose which the forum at issue serves" (*ibid.* (footnote omitted)). That standard, of course, is the same one that, under *Turner* and *Shabazz*, is applicable in evaluating inmates' constitutional claims.

3. The court of appeals, by applying an erroneous standard of review, has invalidated several portions of the BOP's regulations governing publications.[10] Unless it is overturned, the decision in this nationwide class action will undermine the efforts of prison officials to maintain security by withholding publications that, in their professional opinion, could lead to violence or disorder. The evidence at trial revealed that prison violence is a serious

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[10] The court upheld certain portions of the regulations that were not challenged by respondents (see App., *infra*, 15a; note 3, *supra*). We agree with the court that the regulations should be evaluated on a section-by-section basis and need not be declared either constitutional or unconstitutional in their entirety. Cf. *Prisoners' Union*, 433 U.S. at 138-139 (Stevens, J., concurring in part and dissenting in part). As respondents conceded below, portions of the regulations are constitutional even under strict scrutiny (App., *infra*, 15a). Similarly, a reasonableness standard is not toothless; prison regulations that do not reasonably serve to promote legitimate penological concerns are subject to challenge even under that more lenient standard. Regardless of the test to be applied, then, a court reviewing a facial challenge to a particular set of regulations must examine the individual sections of the regulations separately and determine whether each is justified under the governing standard.

problem, particularly at the higher security facilities (see App., *infra*, 28a). See *Prisoners' Union*, 433 U.S. at 132 ("Prison life, and relations between the inmates themselves and between the inmates and prison officials or staff, contain the ever-present potential for violent confrontation and conflagration."). Yet, while a warden may have a legitimate fear that a particular publication will cause problems, he will rarely be able to prove a *likelihood* of violence or disorder as a result of the admission of a publication. That does not mean that the warden's fears are exaggerated. As the district court specifically found (App., *infra*, 32a), requiring such a high degree of proof "could result in admission of publications which, even if they did not lead directly to violence, would exacerbate tensions and lead indirectly to disorder." The recent uprisings by Mariel Cuban prisoners at two federal facilities confirm that information from the outside can, in some circumstances, have grave consequences within a prison. Accordingly, prison officials must be allowed "to take reasonable steps to forestall * * * a threat * * * before the time when they can compile a dossier on the eve of a riot" (*Prisoners' Union*, 433 U.S. at 132 (footnote omitted)).[11]

[11] This is not to suggest that the BOP has excluded large numbers of publications in the past or that it would expect to do so in the future if the decision of the court of appeals were reversed. The number of publications actually withheld under the regulations has been quite small. For example, the BOP advises us that during the one-year period between September 1, 1986, and August 31, 1987, an estimated 1728 publications were withheld by federal prisons out of approximately 1.8 million publications sent to federal inmates. These figures – which are derived from surveys of individual prisons – reveal that, during the sample period, only about one publication was withheld for every 1,000 received by federal prisoners. Yet, while the number of rejected publications is small, the BOP believes that certain publications have a considerable potential for disruptive effect, and that it must retain the right to reject publications without having to satisfy a strict scrutiny test of the sort imposed by the court of appeals.

Under the court of appeals' standard of review, the decision whether a publication threatens prison security would in effect shift from prison administrators to the courts. In virtually every case, a prisoner can make a nonfrivolous claim that the publication at issue was improperly withheld under the court's onerous standard of review. Courts would therefore become the "primary arbiters" (*Turner*, slip op. 9) of the kinds of publications that belong in a prison. That is precisely the kind of result that this Court has repeatedly sought to prevent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General
WILLIAM F. WELD
Assistant Attorney General
WILLIAM C. BRYSON
Deputy Solicitor General
ROBERT H. KLONOFF
Assistant to the Solicitor General
ANDREW LEVCHUK
CURTIS E. HALL
Attorneys

FEBRUARY 1988

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5718
(Civil Action No. 73-01047)

JACK ABBOTT, ET AL., APPELLANTS

v.

EDWIN MEESE, III, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

July 28, 1987

Before: EDWARDS and RUTH BADER GINSBURG, Circuit Judges, and FAIRCHILD, Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit.**

Opinion for the Court filed by Senior Circuit Judge FAIRCHILD.

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* The complaint, filed in 1973, names as its first defendant Elliot Richardson, individually and as Attorney General of the United States. Insofar as he was sued in his official capacity, his successors in office from time to time have been automatically substituted by operation of FEDERAL RULE OF CIVIL PROCEDURE 25(d)(1), including the present Attorney General, the Honorable Edwin Meese, III. Other defendants are the Director of the Federal Bureau of Prisons, and a number of others, individually and as wardens of federal prison facilities.

** Sitting by designation pursuant to 28 U.S.C. § 294(d).

FAIRCHILD, Senior Circuit Judge.

This action involved, among other things, regulation of correspondence between inmates of different prisons, and rejection of publications directed to inmates. Named plaintiffs were prisoners and former prisoners suing on behalf of themselves and all other prisoners in federal institutions. On June 7, 1974, the district court ordered that the action be maintained as a class action, except for determining the question of damages, and that the class consist of all current and future prisoners. On September 1, 1978, on plaintiff's [*sic*] motion, the district judge ordered the addition, as plaintiffs, of the Prisoners' Union, Weekly Guardian Associates, and the Revolutionary Socialist League, publishers of publications which had been rejected at federal prisons.

On September 13, 1984, after trial, the district court filed a decision, and ordered defendants permanently enjoined from applying certain regulations, but granted judgment for defendants in all other respects. Plaintiffs and defendants appealed from the portions of the judgment adverse to them. Defendants' appeal, however, was later dismissed on their motion. Individual damage claims had been "severed" before trial. Assuming that the existence of unresolved damage claims deprives the judgment of finality, we have jurisdiction under 28 U.S.C. § 1292(a)(1) since the order refused injunctions sought by plaintiffs.

In arguing the appeal, plaintiffs have not challenged all the portions of the judgment adverse to them. The issues argued relate to a general prohibition, with certain exceptions, of inmate-to-inmate correspondence, and censorship of publications directed to inmates.

I. PROHIBITION ON INMATE-TO-INMATE CORRESPONDENCE.

The regulation relating to correspondence between inmates, 28 C.F.R. § 540.17 (1986), reads as follows:

> An inmate may be permitted to correspond with an inmate confined in any other penal or correctional institution, providing the other inmate is either a member of the immediate family, or is a party or a witness in a legal action in which both inmates are involved. The Warden may approve such correspondence in other exceptional circumstances, with particular regard to the security level of the institution, the nature of the relationship between the two inmates, and whether the inmate has other regular correspondence. The following additional limitations apply:
>
> (a) Such correspondence at institutions of all security levels may always be inspected and read by staff at the sending and receiving institutions (it may not be sealed by the inmate);
>
> (b) The Wardens of both institutions must approve of the correspondence.

Although the language is permissive in form, the record indicates that the regulation amounts to a prohibition except for correspondence between family members or those involved in a legal action.

The district court upheld the regulation, writing as follows:

> The plaintiffs contend that the general ban on prisoner-to-prisoner correspondence destroys prisoner relationships, thus working a hardship on inmates and prohibiting a potentially rehabilitative activity. As on the publications issues, the plaintiffs

point to state systems which have liberal policies but find no adverse results.

They argue that inmate "grapevines" are usually strong enough to relay information between prisons without the benefit of mail privileges, rendering the ban on written communication useless and therefore unduly restrictive.

The defendants respond that prisoner-to-prisoner mail could be used for communication between members of prison gangs: in particular it could be used to arrange assaults on inmates who are transferred under the Bureau's protective custody program. Testimony on the conduct of prison gangs indicated that this is not a remote possibility. There was evidence, too, that prisioners have succeeded in sending letters to one another in order to carry on drug transactions and formulate escape plans. The plaintiffs suggest that the risk of such problems could be handled by monitoring correspondence; but the defendants reply that they could not hope to monitor a sufficient number of letters, and in any event, prisoners could easily write in private jargon that prison authorities would not understand. Thus no less restrictive policy than a general ban on inter-inmate correspondence is in the interest of security. The court sustains this position. Again, as in the case of publications, the Bureau is not obliged to take risks other systems accept, nor is it required to forego controlling one means of communication where it cannot all means.

The Supreme Court recently upheld a very similar prohibition in *Turner v. Safley*, ___ U.S. ___, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). *Turner* clearly controls this point, with one possible exception.

The regulation considered in *Turner* permits correspondence "concerning legal matters," but the regulation before us is more restrictive, permitting an inmate to correspond with another inmate who "is a party or a witness in a legal action in which both inmates are involved."

Plaintiffs challenge the regulation on the ground that it prevents inmates from seeking and obtaining legal assistance from other inmates. This argument rests upon the inmates' "constitutional right of access to the courts." *Bounds v. Smith*, 430 U.S. 817, 821, 97 S.Ct. 1491, 1494, 52 L.Ed.2d 72 (1977).

In *Johnson v. Avery*, 393 U.S. 483, 490, 89 S.Ct. 747, 751, 21 L.Ed.2d 718 (1969), the Supreme Court held that "unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly enforce a regulation . . . barring inmates from furnishing such assistance to other prisoners." *See Rudolph v. Locke*, 594 F.2d 1076, 1078 (5th Cir. 1979). *Johnson* was extended to assistance in civil rights actions in *Wolff v. McDonnell*, 418 U.S. 539, 577-80, 94 S.Ct. 2963, 2985-86, 41 L.Ed.2d 935 (1974). 430 U.S. at 828, 97 S.Ct. at 1498. As suggested by the *Johnson* language, there is no absolute right to the assistance of another inmate if a reasonable alternative is provided.

It has been held that where an adequate method of access is provided, an inmate may not insist on the right to the assistance of a particular inmate. *Gometz v. Henman*, 807 F.2d 113, 116 (7th Cir.1986); *Storseth v. Spellman*, 654 F.2d 1349, 1353 (9th Cir.1981).

The Bureau has several regulations pertaining to "Inmate Legal Activities" 28 C.F.R. § 543.10-.16. Defendants point out a provision requiring each Warden to establish an inmate law library and procedures for access to legal reference materials and to legal counsel, and for the

preparation of legal documents. Section 543.15 governs legal aid programs which are funded or approved by the Bureau. Section 543.11(f) provides that unless the institution has an active, ongoing legal aid program, the Warden shall allow an inmate the assistance of another inmate during leisure time.

If, in fact, the Bureau failed to provide resources and assistance sufficient to fulfill an inmate's right to meaningful access to the courts without the assistance of inmates in other institutions by correspondence, an amendment to the prohibition of correspondence would be required. The record, however, does not establish the lack of a reasonable alternative.

II. REJECTION OF PUBLICATIONS

The Bureau of Prisons has issued regulations delegating to each warden authority to reject a publication to which an inmate has subscribed or which has been otherwise sent to him. Generally the warden may reject a publication only if it is determined "detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity." 28 C.F.R. § 540.71(b) (1986). The regulation also sets forth a non-exhaustive list of criteria, and a publication which meets one of them "may" be rejected. Rejection by the warden is subject to appeal within the Bureau of Prisons. We set forth in an Appendix the governing regulations, 28 C.F.R. § 540.70 and § 540.71(b), (c), (d), and (e), as well as a portion of a Bureau Program Statement No. 5266.5 which contains updated additional instructions dealing with sexually explicit material.

Plaintiffs challenge on First Amendment grounds parts of § 540.71(b) and the Program Statement facially and as applied. They seek a specific determination on 46 rejected

publications. "[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier,* 417 U.S. 817, 822, 94 S.Ct. 2800, 2804, 41 L.Ed.2d 495 (1974). The freedom of the inmates to receive publications and to read them is at stake. "It is now well established that the Constitution protects the right to receive information and ideas. 'This freedom [of speech and press] . . . necessarily protects the right to receive. . . .'" *Stanley v. Georgia,* 394 U.S. 557, 564, 89 S.Ct. 1243, 1247, 22 L.Ed.2d 542 (1969) (quoting *Martin v. City of Struthers,* 319 U.S. 141, 143, 63 S.Ct. 862, 863, 87 L.Ed. 1313 (1943)). More significantly, however, in this area of the law, the regulation causes a restriction on the First Amendment rights of the publishers of the material, including those publishers who are plaintiffs. *See Procunier v. Martinez,* 416 U.S. 396, 409, 94 S.Ct. 1800, 1809, 40 L.Ed.2d 224 (1974), and *Turner,* ____ U.S. at ____, 107 S.Ct. at 2259.

The Supreme Court has not articulated a standard of review to be applied to censorship of content in the exact context presented here. *Martinez,* 416 U.S. at 413, 94 S.Ct. at 1811 comes close. *Martinez* dealt with ideas expressed in correspondence (where here the expressions come to the inmate in published material). *Martinez* dealt with inter-personal communication between inmates and non-inmates, and emphasized protection of the rights of the non-inmate correspondent in two-way communication (where here the communication is in one direction, and not between individuals; the right of the non-inmate being to publish and the right of the inmate being to receive and read). Both *Martinez* and the case at bar deal with some aspect of the First Amendment rights of a non-inmate, and both deal with the expression of ideas on paper and

not with conduct qua expression. We conclude that the *Martinez* standards are applicable here.[1]

Stating criteria for justifying censorship of prisoner mail, the *Martinez* Court said,

> First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements. Rather, they must show that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation. Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. Thus a restriction on inmate correspondence that furthers an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad.

416 U.S. at 413, 94 S.Ct. at 1811.

[1] A number of courts have so held: *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1030 (2d Cir. 1985); *Aikens v. Jenkins*, 534 F.2d 751, 755 (7th Cir. 1976); *Carpenter v. South Dakota*, 536 F.2d 759 (8th Cir. 1976); *Cofone v. Manson*, 409 F.Supp. 1033, 1039 (D.Conn.1976); *Jackson v. Ward*, 458 F.Supp. 546, 558 (W.D.N.Y.1978); *McCleary v. Kelly*, 376 F.Supp. 1186, 1189 (M.D.Pa.1974); *Hopkins v. Collins*, 411 F.Supp. 831, 833 (D.Md. 1975), *reversed in part on other grounds*, 548 F.2d 503 (4th Cir.1977); *Hardwick v. Ault*, 447 F.Supp. 116, 131 (M.D.Ga.1978). *See*, however, a suggestion that the standards for censorship of publications may be lower than *Martinez: Blue v. Hogan*, 553 F.2d 960 (5th Cir.1977); *Guajardo v. Estelle*, 580 F.2d 748, 760 (5th Cir. 1978); *cf. Vodicka v. Phelps*, 624 F.2d 569 (5th Cir.1980).

Although in *Turner*, the Court rejected application of the stricter *Martinez* standard to regulation of correspondence between inmates, we conclude that it did not overrule or restrict *Martinez* as applied to situations where the First Amendment rights of non-inmates are involved.

Critical to both the *Martinez* holding and our case is the question of the required degree of probability that an expression of an idea will cause conduct destructive of security or order. (Little in our case involves a claimed impairment of rehabilitation.) Turning to that matter, the *Martinez* Court went on:

> This does not mean, of course, that prison administrators may be required to show with certainty that adverse consequences would flow from the failure to censor a particular letter. Some latitude in anticipating the probable consequences of allowing certain speech in a prison environment is essential to the proper discharge of an administrator's duty. But any regulation or practice that restricts inmate correspondence must be generally necessary to protect one or more of the legitimate governmental interests identified above.

416 U.S. at 414, 94 S.Ct. at 1811. We think it follows that a regulation authorizing censorship must reflect, and in applying the regulation the prison administrator must carry, the burden of showing that the censorship is "generally necessary."[2]

[2] *See Abdul Wali v. Coughlin*, 754 F.2d 1015, 1033 (2d Cir.1985); *Morgan v. LaVallee*, 526 F.2d 221, 224 (2d Cir.1975); *Guajardo v. Estelle*, 580 F.2d 748, 760 n.7 (5th Cir.1978); *Vodicka v. Phelps*, 624 F.2d 569, 574 (5th Cir.1980); *Aikens v. Jenkins*, 534 F.2d 751, 755 (7th Cir.1976); *Jackson v. Ward*, 458 F.Supp. 546, 557 (W.D.N.Y.1978); *Hardwick v. Ault*, 447 F.Supp. 116, 131 (M.D.Ga.1978); *Mawby v. Ambroyer*, 568 F.Supp. 245, 251 (E.D.Mich.1983). *Cf. Carpenter v. South Dakota*, 536 F.2d 759 (8th Cir.1976).

The district court, however, concluded that the *Martinez* standards are not applicable to censorship of publications, and placed the burden of proof on plaintiffs. Citing *Pell v. Procunier,* 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974), *Jones v. North Carolina Prisoners' Union,* 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977), and *Bell v. Wolfish,* 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), the court said,

> Those cases require the Bureau to articulate a rational relationship between its regulations (and practices) and legitimate penological objectives such as internal security. Once the Bureau meets that requirement, the plaintiffs must show by "substantial evidence" that the defendants have "exaggerated their response" to the problems the regulations address.

The government argues in support of the district court's conclusions. We think these cases dealt with action and conduct occurring or threatened within the prisons and we do not agree that they state the standard for permissible censorship of information and ideas expressed in publications.

The regulation upheld in *Pell v. Procunier* forbade press and other media interviews with specific individual inmates. The Court said, in part,

> Although they would not permit prison officials to prohibit all expression or communication by prison inmates, security considerations are sufficiently paramount in the administration of the prison to justify the imposition of some restrictions on the entry of outsiders into the prison for face-to-face contact with inmates.
>
> * * * * *
>
> Such considerations [permitting rehabilitative visitation while keeping visitations at a level which will not compromise security] are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.

417 U.S. at 827, 94 S.Ct. at 2806.

In distinguishing *Martinez,* the Court stated as follows:

> In *Procunier v. Martinez, supra,* we could find no legitimate governmental interest to justify the substantial restrictions that had there been imposed on written communications by inmates. When, however, the question involves the entry of people into the prisons for face-to-face communication with inmates, it is obvious that institutional considerations, such as security and related administrative problems, as well as the accepted and legitimate policy objectives of the corrections system itself, require that some limitation be placed on such visitations. So long as reasonable and effective means of communication remain open and no discrimination in terms of content is involved, we believe that, in drawing such lines, "prison officials must be accorded latitude."

417 U.S. at 826, 94 S.Ct. at 2806 (citation omitted).

In *Jones v. North Carolina Prisoners' Union,* the Court upheld actions of prison officials prohibiting inmates from soliciting other inmates to join the Prisoners' Union, barring all meetings of the Union, and refusing to deliver packets of Union publications mailed in bulk to several inmates for redistribution among others. 433 U.S. at 121, 97 S.Ct. at 2535. The prison officials held the view that a prisoners' union would be detrimental to order and security. "It is enough to say they have not been conclusively

shown to be wrong in this view." 433 U.S. at 132, 97 S.Ct. at 2541.

> If the appellants' views as to the possible detrimental effects of the organizational activities of the Union are reasonable, as we conclude they are, then the regulations are drafted no more broadly than they need be to meet the perceived threat—which stems directly from group meetings and group organizational activities of the Union. *Cf. Procunier v. Martinez,* 416 U.S. at 412-16, 94 S.Ct. at 1810-13. When weighed against the First Amendment rights asserted, these institutional reasons are sufficiently weighty to prevail.

433 U.S. at 133, 97 S.Ct. at 2541.

Again, as in *Pell v. Procunier,* conduct within the prison, rather than the content of expression, was the critical issue.

> Nor does the prohibition on inmate-to-inmate solicitation of membership trench untowardly on the inmates' First Amendment speech rights. Solicitation of membership itself involves a good deal more than simple expression of individual views as to the advantages or disadvantages of a union or its views; it is an invitation to collectively engage in a legitimately prohibited activity. If the prison officials are otherwise entitled to control organized activity within the prison walls, the prohibition on solicitation for such activity is not then made impermissible on account of First Amendment considerations, for such a prohibition is then not only reasonable but necessary.

433 U.S. at 131-32, 97 S.Ct. at 2540-41 (citation omitted).

> In *Bell v. Wolfish,* the Court decided that a prohibition against receipt of hardback books unless mailed directly from publishers, book clubs, or bookstores does not violate the First Amendment rights of MCC inmates. [*sic*: previous sentence not part of 441 U.S. at 550-51] That limited restriction is a rational response by prison officials to an obvious security problem. It hardly needs to be emphasized that hardback books are especially serviceable for smuggling contraband into an institution; money, drugs, and weapons easily may be secreted in the bindings. They also are difficult to search effectively. There is simply no evidence in the record to indicate that MCC officials have exaggerated their response to this security problem and to the administrative difficulties posed by the necessity of carefully inspecting each book mailed from unidentified sources. Therefore, the considered judgment of these experts must control in the absence of prohibitions far more sweeping than those involved here.

441 U.S. at 550-51, 99 S.Ct. at 1880 (citation omitted).

As the Court pointed out, this rule operated without regard to the content of the expression. *Id.* at 551, 99 S.Ct. at 1880.

In *Turner v. Safley,* ___ U.S. ___, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), the Court upheld a prison regulation prohibiting correspondence between inmates of different institutions unless they are family members, and struck down a regulation greatly restricting marriage of an inmate. The lower courts had applied *Martinez* to the prohibition on inmate-to-inmate correspondence. The Supreme Court found that reliance improper, saying of *Martinez,*

> [O]ur holding therefore turned on the fact that the challenged regulation caused a "consequential restriction on the First and Fourteenth Amendment rights of those who are *not* prisoners." *Id.,* 416 U.S. at 409, 94 S.Ct. at 1809. (emphasis added). We expressly

reserved the question of the proper standard of review to apply in cases "involving questions of 'prisoners' rights.' " *Ibid.*

Id. at ____, 107 S.Ct. at 2260.

After summarizing the decisions which came after *Martinez,* the Court said:

> If *Pell, Jones* and *Bell* have not already resolved the question posed in *Martinez,* we resolve it now: when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.

Id. at ____, 107 S.Ct. at 2261. The Court concluded that the prohibition of correspondence between inmates fulfilled the standard, but the rule on marriage did not.

We find no holding that the tests for prison censorship of a publication on the basis of content, having an impact on the rights of the publishers, are different from those stated in *Martinez.*

If a regulation were to authorize the Warden to reject a portion of a publication only if he found that the material would "encourage" violence, or some other specified type of conduct breaching security or order or in some particular way impairing rehabilitation, we think that regulation could survive the minimum *Martinez* tests. Language in *Martinez* suggests that encouragement would be a sufficient causal nexus between expression and proscripted conduct so that the expression could be rejected.[3] A Warden's finding to that effect would be entitled, on review, to deference by reason of his expertise. *Martinez,* 416 U.S. at 405, 414 94 S.Ct. at 1807, 1811; *Pell,* 417 U.S.

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[3] Whether "encourage," standing alone, sufficiently connotes propelling action or conduct in other First Amendment contexts may be questioned. *See United States v. Dellinger,* 472 F.2d 340, 361 (7th Cir.1972).

at 827, 94 S.Ct. at 2806; *Jones,* 433 U.S. at 126, 97 S.Ct. at 2538; *Bell,* 441 U.S. at 551, 99 S.Ct. at 1880; and *Turner,* ____ U.S. at ____, 107 S.Ct. at 2260. Going beyond minimum constitutional requirements, it would follow that the more pointedly the regulation spelled out a requirement of a specific finding, including reasons therefor, that particular rejected material would very probably produce a specifically described breach of security or order or an impairment of rehabilitation in some particular way, the more likely each rejection would be sustained when challenged in court.

The regulation before us, however, fails to satisfy the minimum *Martinez* test. Although the introductory paragraph of (b) appears at first to limit the Warden's authority to rejecting material "determined detrimental to the security, good order, or discipline of the institution," it goes on to provide: "or if it might facilitate criminal activity." "[M]ight facilitate" permits a far looser causal nexus between expression and proscribed conduct than "encourages." Moreover, the term "detrimental" is susceptible of different meanings and must be interpreted in the light of the fact that the Regulation goes on expressly to authorize rejection of a publication which meets any one of a list of seven criteria, the list being non-exhaustive.

Plaintiffs do not challenge criterion (1) ("depicts or describes procedures for the construction or use of weapons, ammunition, bombs, or incendiary devices"); a portion of (2) ("contains blueprints, drawings or similar description of Bureau of Prisons institutions"); (3) ("depicts or describes procedures for the brewing of alcoholic beverages, or the manufacture of drugs"); or (4) ("written in code")[.]

The balance of criterion (2) authorizes rejection of a publication which "depicts, encourages, or describes methods of escape from correctional facilities. Although

"encourages" would suffice as a causal nexus between expression and proscribed conduct, "depicts" and "describes" do not.

Criterion (5) is deficient in several respects. It authorizes rejection of a publication which "depicts, describes or encourages activities which may lead to the use of physical violence or group disruption." Again, "depicts" and "describes" fall short. "Activities" are described as those which "may lead" to physical violence or group disruption. "Group disruption" could mean types of events which are not a breach of security or order or an impairment of rehabilitation.

Criterion (6) authorizes rejection of a publication which "encourages or instructs in the commission of criminal activity." As to that which "instructs" there is no requirement of a finding of a probability that the publication will produce a breach of security or order or an impairment of rehabilitation.

Criterion (7) relating to sexually explicit material should doubtless be read as interpreted or qualified by Bureau Program Statement No. 5266.5. (*See* Appendix.) Paragraph (a) of the Statement enumerates specific types of sexually explicit material, but it requires no finding of causal nexus between possession of the listed material and breaches of security or order or impairment of rehabilitation.

The Bureau follows the practice of rejecting and returning an entire publication once a portion of it is deemed objectionable. Even assuming that the portion is appropriately rejected under *Martinez* standards, rejection of the balance is not "generally necessary" to protect the legitimate governmental interest involved in the portion properly rejected. Defendant Carlson admitted that there is really no reason for not deleting the offending material and turning over the balance to the inmate, although there

was testimony by some that in their judgment deleting specific portions would generate more discontent than total rejection. The district court found that these fears were reasonably founded. We conclude the finding conflicts with the holding of *Martinez* that prison administrators have the burden of showing that a restrictive practice is "generally necessary." 416 U.S. at 414, 94 S.Ct. at 1812. Thus, this practice of rejecting an entire publication where a part is objectionable is inconsistent with the First Amendment.

At the time of rejection of a publication, the Warden writes to the inmate, informing him of the rejection and the reasons for it. 28 U.S.C. [*sic*: C.F.R.] § 540.71(d) (1986). The district court did not address particular reasons for rejection, but generally concluded "that the notices normally make the general nature of the warden's objections clear," and that the

> explanations are not as articulate as they might be, but neither are they simply restatements of the general standard for excluding publications. Chiefly they lack reference to the circumstances in the prison that support the Warden's decision. At first this is a striking omission, since the Warden's awareness of conditions in his particular facility is the theoretical basis for his wide discretion to reject publications. Defense witnesses testified, however, that it is unwise to inform inmates of conditions that cause security concerns in the Warden. Such a policy could expose weaknesses in prison security to exploitation by inmates. This reasoning the court finds, supports the defendant's practice.

We have not examined every statement of reasons for rejection, but there are some, at least, which cannot be deemed findings of an adequate causal nexus between a re-

jected publication and a breach of security or order or interference with rehabilitation. Examples are:

(1) The publication is the March 21, 1977, issue of *The Call*. The relevant small portion of the issue is an article entitled "Hell holes at Marion Prison-Prisoners expose 'Control Unit'." The story is highly critical of described practices, but is narrative in form. While asserting that "inmates have staged strikes and facts and have continued to struggle against their oppression," it contains no exhortation. The Atlanta warden's comment asserts that the issue

> states that prisoners should revolt against the use of control units and further indicates that inhumane treatment is being administered by racist guards, within the Federal Prison System. The inflammatory material contained in this issue of *'The Call'* can present problems in a facility such as ours and is considered not to be in the best interest of discipline, good order and security of the institution.

(2) The same issue was rejected at Marion with the comment,

> The . . . Committee believes that this publication is used in part to glorify problem inmates and prison unions which could cause problems to inmates and staff in the security and orderly running of this institution. This publication also [propagates] an adversary attitude by inmates toward staff.

(3) One article in *Labyrinth*, April 1977, was entitled "Medical Murder." It reported two deaths in federal prisons and two in a state prison. Each story related inadequate or improper medical treatment, and concluded that the prisoners, although sentenced to terms, were "in fact

sentenced to death and *were murdered by neglect.*"[4] (Emphasis in the original.) The letter rejecting this issue of *Labyrinth* explained:

> The basis for our decision is that this type of philosophy could guide inmates in this institution into situations which could cause themselves and other inmates problems with the Medical staff.

(4) The September 15-October 14, 1977, issue of *Torch* contained a letter ostensibly from an inmate in a state penitentiary. The writer described hard conditions of prison work and life. It was printed under the title "Slave Labor at Angola Penitentiary." The issue was rejected with the comment,

> The article on "Slave Labor at Angola Penn" has as the main theme organization and unity of inmates against correctional institutions. This philosophy guides individual inmates into situations which can cause themselves and other inmates problems with the posted regulations of this institution. Additionally, this type of material on institutions has a tendency to develop an adversary attitude by inmates toward staff, which can cause an unhealthy environment in this institution. This type of attitude is detrimental to the good orderly running of this institution.

(5) A rejection of a magazine in 1981 referred to material by page numbers, saying that it "depicts, describes or encourages activities which may lead to use of physical violence or group disruption." One of defendants conceded in testimony that "it should spell out more specifically the purpose of the rejection."

The Court said in *Martinez*:

> This does not mean, of course, that prison administrators may be required to show with certainty

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[4] The complaint in an action brought on account of one of these deaths was considered in *Green v. Carlson*, 581 F.2d 669 (7th Cir.1978), *aff'd, Carlson v. Green*, 446 U.S. 14, 100 S.Ct.1468, 64 L.Ed.2d 15 (1980).

> that adverse consequences would flow from the failure to censor a particular letter. Some latitude in anticipating the probable consequences of allowing certain speech in a prison environment is essential to the proper discharge of an administrator's duty.

416 U.S. at 414, 94 S.Ct. at 1811.

In our view, allowing such latitude, none of the comments just quoted constitutes a reasoned determination that the material encouraged conduct which would constitute, or otherwise was likely to produce, a breach of security or order or an impairment of rehabilitation.

The district court did not deal individually with the rejected publications. It wrote,

> Examination of the publications before the court confirms the proposition that publications can present a security threat. Not only the racial publications but materials concerning prison management and prison life often speak in strident, inflammatory terms; a warden might well find such publications too provocative for his institution at a given time. Other publications too might be dangerous to have on hand in a particular facility: A sexual magazine, for example, might be undesirable in an institution that has had a high incidence of sexual assault. The possible dangerous situations are as various as publications and circumstances at given institutions.
>
> The court therefore upholds the defendants' position that publications can present a security threat; and it also upholds the adoption of a standard that gives the warden wide discretion.

The court's generalized conclusions concerning the rejected materials logically follow from the court's conclusion that the deferential standards of *Pell, Jones, and Bell* control, and that plaintiffs had the burden of proving that

defendants have "exaggerated their response" to problems rationally related to legitimate penological objectives. Although plaintiffs' experts testified to the effect that the defendants' rejection policy went further than necessary, the court gave greater weight to the testimony on behalf of defendants.

Our conclusion, however, is that although deference is to be accorded to defendants' expertise, they have the burden of showing that a rejection of a publication is at least "generally necessary to protect one or more of the legitimate governmental interests . . ." of security, order, or rehabilitation. *Martinez*, 416 U.S. at 414, 94 S.Ct. at 1812. It follows that the rejections should have been addressed individually and none upheld unless consistent with *Martinez*.

We note, of course, that some of the rejections occurred as early as 1977. Many of the items were periodicals current at that time. In several instances a defendant testified that in the light of changed circumstances a publication rejected in that period at one institution would not be rejected now. It may well be that there is no longer a real controversy over some of the publications. On remand the district court should determine whether and to what extent the individual rejections are moot. As to those which are not, the court should determine the propriety under *Martinez* of each rejection.

Insofar as the judgment appealed from denied relief on First Amendment grounds from rejection of publications, it is REVERSED and the cause REMANDED for further proceedings consistent with this opinion. In all other respects, the judgment is AFFIRMED. The parties shall bear their own costs on appeal.

28 C.F.R. § 540.70 (1986).

(a) The Bureau of Prisons permits an inmate to subscribe to or to receive publications without prior approval and has established procedures to determine if an incoming publication is detrimental to the security, discipline, or good order of the institution or if it might facilitate criminal activity. The term publication, as used in this rule, means a book (for example, novel, instructional manual), or a single issue of a magazine or newspaper, plus such other materials addressed to a specific inmate as advertising brochures, flyers, and catalogues.

(b) The Warden may designate staff to review and where appropriate to approve all incoming publications in accordance with the provisions of this rule. Only the Warden may reject an incoming publication.

28 C.F.R. § 540.71(1986).

(b) The Warden may reject a publication only if it is determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity. The Warden may not reject a publication solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant. Publications which may be rejected by a Warden include but are not limited to publications which meet one of the following criteria:

(1) [It depicts or describes procedures for the construction or use of weapons, ammunition, bombs or incendiary devices;]

(2) It depicts, encourages, or describes methods of escape from correctional facilities, [or contains

blueprints, drawings or similar descriptions of Bureau of Prisons institutions;]

(3) [It depicts or describes procedures for the brewing of alcoholic beverages, or the manufacture of drugs;]

(4) [It is written in code;]

(5) It depicts, describes or encourages activities which may lead to the use of physical violence or group disruption;

(6) It encourages or instructs in the commission of criminal activity;

(7) It is sexually explicit material which by its nature or content poses a threat to the security, good order, or discipline of the institution, or facilitates criminal activity.

* * * * *

(c) The Warden may not establish an excluded list of publications. This means the Warden shall review the individual publication prior to the rejection of that publication. Rejection of several issues of a subscription publication is not sufficient reason to reject the subsciption publication in its entirety.

(d) Where a publication is found unacceptable, the Warden shall promptly advise the inmate in writing of the decision and the reasons for it. The notice must contain reference to the specific article(s) or material(s) considered objectionable. The Warden shall permit the inmate an opportunity to review this material for purposes of filing an appeal under the Administrative Remedy Procedure unless such review may provide the inmate with information of a nature which is deemed to pose a threat or detriment to the security, good order or discipline of the institution or to encourage or instruct in criminal activity.

(e) The Warden shall provide the publisher or sender of an unacceptable publication a copy of the rejection letter. The Warden shall advise the publisher or sender that he may obtain an independent review of the rejection by writing to the Regional Director within 15 days of receipt of the rejection letter. The Warden shall return the rejected publication to the publisher or sender of the material unless the inmate indicates an intent to file an appeal under the Administrative Remedy Procedure, in which case the Warden shall retain the rejected material at the institution for review. In case of appeal, if the rejection is sustained, the rejected publication shall be returned when appeal or legal use is completed.

The bracketed language in § 540.71(b) is not challenged by the plaintiffs.

Program Statement No. 5266.5 reads, in part, as follows:

(a) A Warden may determine that sexually explicit material of the following types is to be excluded, as potentially detrimental to the security, or good order, or discipline of the institution, or facilitating criminal activity:

(1) Homosexual (of the same sex as the institution population).

(2) Sado-masochistic.

(3) Bestiality.

(4) Involving children.

(b) The following points should be emphasized:

(1) It is the local Warden's decision (except for the child-model materials, which are prohibited by law)—a sexually explicit homosexual publication for example may be admitted if it is determined not to pose a threat at the local institution;

(2) Explicit heterosexual material will ordinarily be admitted;

(3) Sexually explicit material does not include material of a news or information type—publications covering the activities of gay rights organizations or gay religious groups, for example, should be admitted;

(4) Literary publications should not be excluded, solely because of homosexual themes or references, if they are not sexually explicit, and

(5) Sexually explicit material may nonetheless be admitted if it has scholarly value, or general social or literary value.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 73-1047

JACK ABBOTT, ET AL., PLAINTIFFS

v.

ELLIOT L. RICHARDSON, ET AL., DEFENDANTS

[Filed Sep. 13, 1984]

MEMORANDUM OPINION

This class action, brought by convicted prisoners residing in the United States Bureau of Prisons ("Bureau") facilities, challenges Bureau policies and practices regarding incoming publications and inmate correspondence. The plaintiffs allege violations of the first, fifth, and sixth amendments to the United States Constitution. They are joined in their first amendment claims by publishers of certain materials excluded from federal prisons by one or more of the defendants. All plaintiffs seek declaratory and injunctive relief.[1]

The case was tried by this court, sitting without a jury, for ten days in May and June of 1981. The case was submitted on May 3, 1982. Upon consideration of all the evidence, the court now makes the following findings of fact and conclusions of law.

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[1] Individual claims for damages were severed by order of this court on October 23, 1979.

I. Findings of Fact[2]

A. *Background*

The Bureau of Prisons administers a system of 43 institutions including penitentiaries, camps, medical centers, and short-term detention facilities. The penal institutions are classified on a scale of one to six according to their security. At level one institutions, such as the co-ed facility at Lexington, Kentucky, there are no physical barriers to escape. At the level six institution at Marion, Illinois, escape is made as difficult as possible; and maximum control is exercised over the inmates' activities, their locations throughout the day, and their contact with the outside world.

The federal prisons are considered more "secure" than their state counterparts: that is, subject to fewer violent incidents, fewer escapes, and a lower level of tension in general. The relative security of federal prisons may be partly due to such factors as a better educated staff, a better staff-to-inmate ratio, and better funding. It may also be attributed to the higher prevalence of "white-collar" criminals in the federal systems; but as Bureau Director

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[2] Many of the policies and practices challenged by the plaintiffs were abandoned during the eight-year period preceding the trial. The plaintiffs seek an order preventing the defendants from reinstating these policies and practices. With one exception, however, it does not appear that reinstatement is threatened. The court therefore addresses only the regulations and practices of the Bureau as they now stand. *See Ass'd Third Class Mail Users v. U.S. Postal Service*, 662 F.2d 767, 769-70 (D.C. Cir. 1980).

The exception is a proposed amendment to the "publishers-only" rule. When this litigation began, inmates could only receive publications directly from publishers. Some years prior to trial the Bureau limited this restriction to hard-cover publications. It now proposes to extend the rule to newspapers. 49 Fed. Reg. 20432 (May 14, 1984). As the proposal has not been litigated in this case, it would be inappropriate to address it here.

Norman Carlson testified,[3] that distinction can be somewhat overdrawn. Many federal inmates are convicted of non-violent, white-collar crimes but nevertheless have violent histories. Moreover, the populations of federal and state institutions are not entirely discrete: many state inmates were once federal inmates, and vice versa; in some cases, in fact, state prisoners are transferred to the federal system where they can be controlled more effectively. Finally, while there are 25,000 inmates in federal prisons, the more dangerous offenders are concentrated in the higher-security facilities at levels 4-6.

At the higher-security institutions, where there are aggressive individuals in a crowded, restrictive, and adversarial environment, minimizing violence is a primary concern. In recent years the problem has been aggravated by the growth of ethnic gangs (e.g., the Mexican Mafia, the Aryan Brotherhood, the Black Guerrilla Family) in the federal system. The gangs, which are more firmly established in state systems, engage in organized crime including extortion, drug activity, and homicide.[4] A second factor that compounds the violence problem is homosexuality. While homosexual behavior is prohibited in the federal prisons, it is widespread in the male prisons and tolerated to a degree that varies with the institution. Many assaults on fellow inmates are precipitated by or manifested in homosexual activity.

B. ***Publications***

1. *Standards for exclusion.* Federal prisoners are permitted to subscribe to and receive publications without prior approval. 28 C.F.R. § 540.70. Each publication, however, may be withheld from the inmate and returned

[3] Transcript (Tr.) at 942.

[4] As of 1979 the Bureau was able to trace eight homicides in its institutions to gang activity. Defendants' Exhibit 13.

to the publisher if the warden determines it "detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity." *Id.* The kinds of publications that wardens have excluded under this standard include sexually explicit homosexual and heterosexual magazines; non-explicit homosexual publications (i.e., gay rights material); publications that preach ethnic superiority, such as the newsletter of the American Nazi Party; publications that advocate the unionization of prisoners, highlight instances of alleged abuse by prison officials, or state grievances of prisoners generally;[5] journals that facilitate gambling by giving odds for the week's sporting events; self-defense publications such as *Lethal Unarmed Combat*; and instructional materials on electronics and radio. Magazines and journals are not excluded by title but are reviewed on an issue-by-issue basis.

The parties agree that the standard "detrimental to the security, good order, or discipline of the institution" confers broad discretion on the warden. That discretion is not appreciably limited by the "criteria" and "guidelines" contained in Bureau regulations. The criteria include such generalized descriptions of excludable publications as the following:

> (2) It depicts, encourages, or describes methods of escape from correctional facilities . . .;
>
> . . . .
>
> (5) It depicts, describes or encourages activities which may lead to the use of physical violence or group disruption;

[5] One journal in evidence, for example, contains an article on prison medical care entitled "Medical Murder." Plaintiffs' Exhibit 18. Also in evidence is a calendar containing a rather intellectual set of "statements on the prison experience." Plaintiffs' Exhibit 29. The media plaintiffs publish prisoner union material and articles critical of prisons (on the order of "Medical Murder").

(6) It encourages or instructs in the commission of criminal activity. [28 C.F.R. § 540.71(b).]

These categories are part of a non-exhaustive list. The "guidelines" are the outgrowth of a lawsuit brought by the National Gay Task Force and pertain to sexually oriented publications. The guidelines give special protection to "news or information type" publications, such as newsletters "covering the activity of gay rights organizations," but essentially leave sexually explicit material to be judged under the "security, good order, or discipline" standard. Plaintiffs' Exhibit 4 at 2-3.[6]

The plaintiffs' experts testified that prison wardens do not need this broad discretion to exclude publications. Some of the witnesses asserted that there is no reason to believe publications ever pose a threat to security. They pointed out that there is no empirical evidence of a link between publications and prison disorder, and that some state prisons admit publications freely without incident. The defendants produced a study to show that the pres-

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[6] The full text of the guidelines reads as follows:

(a) A Warden may determine that sexually explicit material of the following type is to be excluded, as potentially detrimental to the security, or good order, or discipline of the institution, or facilitating criminal activity:

1. Homosexual (of the same sex as the institution population).
2. Sado-masochistic.
3. Bestiality.
4. Involving children.

(b) The following points should be emphasized:

1. It is the local Warden's decision (except for child-model materials, which are prohibited by law)—a sexually explicit homosexual publication for example may be admitted if it is determined not to pose a threat at the local institution;

2. Explicit heterosexual material will ordinarily be admitted.

ence of some publications in prison—specifically, homosexual literature—does lead to violence; more persuasive, however, was the testimony of the plaintiffs' witnesses themselves. One witness conceded that publications which preach ethnic superiority "would be sufficiently inflammatory so that there might be some problems with [them]."[7] Another witness agreed and also testified that it would be a "bad idea" to admit gambling publications, gambling debts being a common source of assaults.[8]

Examination of the publications before the court confirms the proposition that publications can present a security threat. Not only the racial publications but materials concerning prison management and prison life often speak in strident, inflammatory terms; a warden might well find such publications too provocative for his institution at a given time. Other publications too might be dangerous to have on hand in a particular facility: a sexual magazine, for example, might be undesirable in an institution that has had a high incidence of sexual assault. The possible dangerous situations are as various as publications and circumstances at given institutions.

The court therefore upholds the defendants' position that publications can present a security threat; and it also upholds the adoption of a standard that gives the warden wide discretion. The defendants concluded that a less generalized regulation would be underinclusive: that is, it could foreclose a warden from excluding a potentially disruptive publication. While it might be better policy to take that risk and enjoy the benefits of more uniform and more liberal admission of publications, the plaintiffs have not shown that such a policy is required. As the defendants argued, the difference between institutions and the changing nature of each institution support their decision

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[7] Tr. at 549.

[8] Tr. at 215-18, 313-14.

to let the warden determine what publications are "detrimental to the security" of his facility. Nor were the defendants required to frame a standard that speaks in terms of a "likely," "immediate," or "substantial" threat.[9] Such a restrictive standard could result in admission of publications which, even if they did not lead directly to violence, would exacerbate tensions and lead indirectly to disorder. The Bureau's choice to avoid that risk is reasonable. It may be, of course, that the kinds of material wardens seek to exclude will enter prisons through other media, such as ordinary daily newspapers, radio and television. But it does not follow that there is no benefit in regulating a medium that is firmly within the warden's control.

2. *Procedure*. The process of excluding a publication begins when it is identified as questionable by a mailroom employee. The publication is forwarded to the warden or his staff, who decides whether or not the material should be admitted. If not, it is returned to the publisher and the inmate is "promptly advise[d] . . . in writing of the decision and the reasons for it," 28 C.F.R. § 540.70(d). As a recent amendment to the regulations provides, the notice must refer to the specific portion of the publication considered objectionable. *Id.* The inmate may appeal to the Regional Director and, at the national level, the General Counsel. *Id.*; 28 C.F.R. § 542.15. He may review the publication for purposes of the appeal, "unless such review may provide the inmate with information of a nature which is deemed to pose a threat or detriment to the security, good order, or discipline of the institution." 28 C.F.R. § 540.70(d).

The plaintiffs' main procedural objection is that inmates are provided with inadequate statements of reasons for exclusion. They claim that reasons are expressed in such

[9] *Cf.* Plaintiffs' Proposed Findings of Fact at 14.

broad terms as to be meaningless. The examples before the court, however, show that the notices normally make the general nature of the warden's objections clear: an issue of *Hustler*, for instance, was rejected because of "extreme pornographic content"; another issue was rejected because it was "deemed to incite abhorrent sexual behavior"; an issue of *The Militant* was rejected because it "is used in part to glorify problem inmates and prison unions" and "propagets [sic] an adversary attitude by inmates toward prison staff"; and an issue of *Crusader* was rejected because it "could elicit aggressive responses from other inmates who are not tolerant of the point of view of the Klu [sic] Klux Klan."[10] Such explanations are not as articulate as they might be, but neither are they simply restatements of the general standard for excluding publications. Chiefly they lack reference to the circumstances in the prison that support the warden's decision. At first this is a striking omission, since the warden's awareness of conditions in his particular facility is the theoretical basis for his wide discretion to reject publications. Defense witnesses testified, however, that it is unwise to inform inmates of conditions that cause security concerns in the warden. Such a policy could expose weaknesses in prison security to exploitation by inmates. This reasoning, the court finds, supports the defendants' practice.

The failure to refer to institutional conditions makes the warden's written decision less easily reviewable. The warden and the Regional Director, however, are often in contact, and this usually provides the reviewing official with supplementary information. Of course, the warden is the source of the information and the process thus encourages heavy reliance on the warden's judgment. But deference to prison wardens on security matters is appropriate where, as here, the wardens make some effort to

[10] Plaintiffs' Exhibits 75, 77, 91; Plaintiffs' Proposed Findings of Fact at 63.

articulate their judgments and thereby respect the interests of inmates. Another fault the plaintiffs find with the appeal process is the lack of an absolute right to review the excluded publication that is the subject of the appeal. But if a publication is excluded for security reasons, it might well be equally hazardous to permit temporary access to it. The warden should have the discretion to deny access to a publication for any purpose where providing it would be self-defeating.

The final contested Bureau practice regarding publications is the exclusion of whole publications when only portions are deemed offensive. The plaintiffs offered evidence that a less restrictive policy, at no cost to security, would be to tear out the rejected portions and admit the rest of the publication. But the defendants contend that such censorship would create more discontent than the current practice, and one of the plaintiffs' witnesses agreed.[11] It is not for this court to decide which practice would endanger security more; it is sufficient that the defendants' fears are reasonably founded.

C. *Correspondence*

1. *Prisoner-to-prisoner correspondence.* Generally inmates in federal institutions are not permitted to correspond with one another. Bureau regulations allow for prisoner-to-prisoner correspondence only where the wardens of both institutions approve. The grounds for approval may be that the inmates are members of the same immediate family, that they are involved in a legal action together, or that "other exceptional circumstances" exist. 28 C.F.R. § 540.16.

The plaintiffs contend that the general ban on prisoner-to-prisoner correspondence destroys prisoner relationships, thus working a hardship on inmates and prohibiting

[11] Tr. at 393.

a potentially rehabilitative activity. As on the publications issues, the plaintiffs point to state systems which have liberal policies but find no adverse results. They argue that inmate "grapevines" are usually strong enough to relay information between prisons without the benefit of mail privileges, rendering the ban on written communication useless and therefore unduly restrictive.

The defendants respond that prisoner-to-prisoner mail could be used for communication between members of prison gangs: in particular it could be used to arrange assaults on inmates who are transferred under the Bureau's protective custody program. Testimony on the conduct of prison gangs indicated that this is not a remote possibility. There was evidence, too, that prisoners have succeeded in sending letters to one another in order to carry on drug transactions and formulate escape plans. The plaintiffs suggest that the risk of such problems could be handled by monitoring correspondence; but the defendants reply that they could not hope to monitor a sufficient number of letters, and in any event, prisoners could easily write in private jargon that prison authorities would not understand. Thus no less restrictive policy then a general ban on inter-inmate correspondence is in the interest of security. The court sustains this position. Again, as in the case of publications, the Bureau is not obliged to take risks other prison systems accept, nor is it required to forego controlling one means of communication where it cannot control all means.

2. *Sealed outgoing general mail.* Mail from inmates in institutions at security levels 4-6 may not be sealed (with the exception of "special mail," *see infra*). The warden thus reserves the right to read any mail sent out by a prisoner. The plaintiffs argue that this policy chills free expression, and their experts testified that it does so unnecessarily. Prison wardens have more efficient ways of gaining information, according to their testimony, and

inmates have other ways of passing messages confidentially (e.g., by telephone). Nevertheless the court finds the policy reasonable. The Bureau permitted sealed outgoing mail for a short period but found that it was occasionally used to conduct illegal business (including drug traffic) and to make escape plans. Most alarming to the Bureau was a report, substantiated by an intercepted inmate letter, that gangs were planning to infiltrate the federal system because the confidential mail would facilitate their activities. In light of those results of the sealed mail policy, the Bureau was not wrong to reverse itself. A warden cannot read every outgoing prisoner letter, but the threat that one's mail will be read may well serve as a deterrent to illegal activity.

3. *Special mail.* Special mail includes mail sent to or received from the following:

> President and Vice President of the U.S., attorneys, Members of the U.S. Congress, Embassies and Consulates, the U.S. Department of Justice (excluding the Bureau of Prisons but including U.S. Attorneys), other Federal law enforcement officers, State Attorneys General, Prosecuting Attorneys, Governors, U.S. Courts, State Courts. [28 C.F.R. § 540.2(c).]

It also includes mail sent to, but not received from, the following:

> [the Bureau of Prisons], Surgeon General, U.S. Public Health Service, Secretary of the Army, Navy, or Air Force . . . U.S. Probation Officers . . . Directors of State Department of Corrections, State Parole Commissioners, State Legislators . . . and representatives of the news media. [*Id.*]

Outgoing special mail may be sealed and is not subject to inspection. 28 C.F.R. § 540.17(c). Incoming special mail may be opened "only in the presence of the inmate for inspection for physical contraband and the qualification of

any enclosures as special mail." 28 C.F.R. § 540.17(a). The sender must mark the envelope as "special mail" if it is to receive special treatment. 28 C.F.R. § 540.17(b).

The plaintiffs object to the fact that the list of outgoing special mail is larger than the list of incoming special mail. The reason for the discrepancy, according to the defendants, is that incoming material tends to jeopardize prison security more than outgoing material. A larger class of incoming special mail would increase the risk of contraband or potentially troublesome messages (e.g., escape plans) entering Bureau facilities. The court agrees that this is a legitimate security concern, and the reservation of the right to read mail from many government agencies is not an overreaction to the risk—especially since the contents of court and attorney mail, both incoming and outgoing, are kept fully confidential.

The plaintiffs urge that the class of outgoing special mail should be expanded to include mail to all government agencies. But this could allow inmates to send a great deal of sealed mail, which would lead to the same problems encountered when sealed mail was generally permitted. The restriction of sealed mail privileges to correspondence to courts, attorneys, law enforcement authorities, major public officers, several other agencies, and the press represents a fair accommodation of the plaintiffs' interests and the Bureau's security concerns.

4. *Enclosures in attorney-prisoner mail.* Mail from attorneys, like all incoming special mail, is inspected for contraband and to verify that it is indeed special mail. The plaintiffs object to this practice. The court, however, is mindful of the words of the Supreme Court:

> The possibility that contraband will be enclosed in letters, even those from apparent attorneys, surely warrants prison officials' opening the letters . . . [Prison authorities], by acceding to a rule whereby the inmate

> is present when mail from attorneys is inspected, have done all, and perhaps even more, than the Constitution requires. [*Wolff v. McDonnell*, 418 U.S. 539, 577 (1974).]

Contraband has been enclosed in mail from attorneys to federal inmates in the past, and attempts have been made to disguise letters as attorney mail in order to carry on illegal activities. The court therefore upholds the defendants' practice.

5. *Notification of opening of sealed mail.* Outgoing general mail from inmates in institutions at security levels 1-3 may be opened and read in the following circumstances:

> (1) If there is reason to believe it would interfere with the orderly running of the institution, that it would be threatening to the recipient, or that it would facilitate criminal activity;
>
> (2) If the inmate is on a restricted correspondence list; or
>
> (3) If the correspondence is between inmates. [28 C.F.R. § 540.13(c).]

When mail is read and rejected, the inmate is notified in writing of the rejection and the reasons for it. 28 C.F.R. § 540.12. The inmate is not notified, however, when the mail is read and sent on. The plaintiffs argue that they should be notified in such instances; the defendants reply that this would increase the already sizable burden of screening inmate mail. Such an increase would presumably force the defendants to either divert manpower from other activities or read fewer letters (to compensate for the time spent on notification). Either alternative could weaken the security of an institution. While these considerations might not justify a policy of *never* informing inmates when their mail is opened, that is not the policy here: the Bureau policy, to some extent, accommodates the plaintiffs' interest in knowing when their correspondence has been disrupted. The Bureau is not required to strike the balance further in the plaintiffs' favor.

6. *Nude photos.* As a matter of unofficial policy, federal wardens do not admit nude photos of inmate family members or friends into federal prisons. A witness for the plaintiffs stated that such photos "can cause a lot of trouble . . . that neither the inmate nor the prison needs,"[12] and the court agrees. Comments on and theft of nude personal photos would be bound to provoke incidents; experience with photos smuggled into federal institutions tends to verify this. The court sustains the Bureau's policy.

7. *Rejection of mail and placement on restricted list.* Under a regulation in force at the time of trial, wardens were authorized to "reject correspondence sent by or to an inmate" if it contained "[c]lear harassment of a member of the public, including invasion of privacy." 28 C.F.R. § 540.13(e) (1982). This was also a criterion for placing an inmate on a restricted correspondence list, which permitted him to correspond with immediate family members and former business associates only. Since the trial, the "clear harassment" regulation has been changed; rejection of mail or placement on the restricted list are now authorized if a letter contains "[t]hreats, extortion, obscenity, or gratuitous profanity." 28 C.F.R. § 540.13(e)(4) (1983). The new regulation was promulgated to comply with *Samuels v. Smith*, No. TH79-124-C (S.D. Ind. Jan. 29, 1982), which held that the "clear harassment" language "violates the First Amendment unless it be construed as limited to threats, extortion, obscenity or gratuitous profanity." This court agrees that the current regulation permissibly authorizes wardens to protect the public from objectionable inmate mail.

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[12] Tr. at 373.

A second basis for rejecting an inmate's incoming mail is that he receives an amount which "places an unreasonable burden on the institution." 28 C.F.R. § 540.13(a). The plaintiffs argue that the administrative burden of handling mail is not sufficient reason to reject incoming letters. The defendants counter that their personnel already expend a great deal of time handling mail; too much strain on their administrative resources, they suggest, could begin to weaken security, even when the strain is not placed directly on those responsible for maintaining order. The defendants' point may be valid in general; it has no application, however, to the rule at issue. When mail is rejected it is returned to the sender; the inmate is notified of the rejection, the reason for it, and his right to appeal. 28 C.F.R. § 540.12. Thus whether a letter is allowed in or rejected, a prison employee must deliver something to the inmate; the difference appears to be that in the case of a rejection, the institution must not only deliver an item but prepare it, address it, and send the rejected letter back. Even more of the institution's energy is required if the inmate exercises his right to appeal. In short, rejection of mail on ground of excessiveness merely replaces one procedure (delivery of the letter) with another, and a more cumbersome one at that. Moreover, institutions already have undisputed control over the number of "advertising brochures, flyers, and catalogues" an inmate may receive, 28 C.F.R § 540.70(d). *See* 28 C.F.R. § 540.70(f). The authority to reject allegedly excessive personal correspondence as well implicates the rights of family members and others with a strong interest in communicating with an inmate, at no benefit to the institution. It follows that the rule granting this authority is not "necessary or essential" to further the defendants' objectives, *see* section II *infra*, and cannot stand.

Placement on a restricted list may be based on the "threats, extortion, [etc.]" criterion discussed above. It

may also be predicated on other factors, including an inmate's:

> (2) Attempting regularly to correspond with persons or businesses where the addressee is known by the inmate only through such sources as advertisements in newspapers, magazines, telephone directories, etc.;
>
> . . . .
>
> (6) Having participated in major criminal activity of a sophisticated nature; or
>
> (7) Notoriety or being highly publicized. [28 C.F.R. § 540.14(a).]

The plaintiffs contest these criteria as unnecessary and overbroad. The court agrees. The prohibition against "regular" correspondence with the "persons or businesses" described is allegedly necessary because in the past, inmates have written to strangers in order to carry out extortion or solicit funds for unauthorized ventures. But such activities are already grounds for placement on a restricted list under other rules. No purpose is served by additionally prohibiting a form in which extortion and solicitation are sometimes carried out; especially, in this case, considering the steps necessary to enforce the rule. A prison employee would first have to note that an inmate was writing "regularly" to "persons or businesses."[11] An employee would then have to ascertain whether the addressee was a stranger to the inmate, presumably by either asking the inmate, asking the addressee, or (more likely, at least as an initial measure) reading one of the letters. In order to enforce the rule, in other words, the institution must keep track of and read an inmate's mail, and perhaps investigate further. The rule thus makes no advance whatever on the institution's ability to prevent or halt

[11] The rule does not make clear whether this means writing many letters to the same person or business, or writing letters to various persons or businesses.

illegal activity, since it has the right to monitor the inmate's mail in any event.[14] It merely authorizes restriction of an inmate's mail for writing letters that may or may not be illegal. The net result is a regulation that may be applied against inmates who have not abused their rights, with no correlative gain on the part of the institution.

Likewise, an inmate's involvement in "major criminal activity of a sophisticated nature" cannot serve as a ground for limiting an inmate's mail. The defendants argue that this criterion is necessary because inmates who have participated in major, sophisticated crimes are likely to continue their activities by mail if permitted. But the regulations already authorize restricting the correspondence of an inmate who "committed an offense involving the mail," 28 C.F.R. § 540.14(a)(5). Inmates who were involved in sophisticated crime other than mail fraud might also attempt abuse of mailing rights, but those are precisely the inmates whose mail the institutions would normally monitor. Obviously the staff cannot read all outgoing general mail; the correspondence of a class of inmates who are considered likely to commit mail offenses, however, would seem to have priority. Monitoring that mail should not be an onerous burden on the institution if inmates who have committed mail fraud may be dealt with more peremptorily. Moreover, even if attempts at criminal activity would be successfully mailed out despite spot-checks by the prison staff, it is not clear that an internal security problem would result. If contraband were mailed to the inmate, it would have to pass by prison employees first. *See* 28 C.F.R. § 540.13(f) ("Institution staff shall open and inspect all incoming general correspondence").

[14] Level 1-3 institutions do not have the right to read outgoing mail. But they may read incoming mail, and they may take note of who an inmate writes to. In any event, the inmates in those institutions are there because they are not sufficiently high risks to be placed in level 4-6 institutions.

If a member of the public received something objectionable, a complaint on his part would remedy the problem; an institution does not need the broad preventive power here that it requires where a riot or assault is possible. In short, no security interest is served by permitting wardens to restrict an inmate's mail solely because he was involved in "sophisticated" crime; and the defendants already have adequate means to combat illegal activity.

Similarly, the rule that permits wardens to limit the mail of "highly publicized" inmates is not necessary. The defendants contend that such inmates tend to attract followers who are easily exploited and induced to commit crimes. But again, reading the mail of those inmates and inspecting it for contraband are measures already within the defendants' power. The interests of non-inmates are protected by the defendants' ability to retaliate when an inmate actually abuses the mail; no broad authority is necessary from the institution's point of view.

II. *Conclusions of Law*

The plaintiffs' claims arise primarily under the first amendment. The Supreme Court has recently reaffirmed that first amendment guaranties apply to prison inmates. *See Hudson v. Palmer*, 104 S. Ct. 3194, 3198 (1984). The analysis to be used, however, requires some discussion.

The plaintiffs argue that the proper standard for evaluating first amendment claims of prisoners is stated in *Procunier v. Martinez*, 416 U.S. 396 (1974). The regulations in *Martinez* authorized employees of California correctional facilities to reject outgoing prisoner mail if, *inter alia*, it " 'express[ed] inflammatory political, racial, religious or other views or beliefs.' " *Id.* at 399. In declaring the regulations unconstitutional, the Court enunciated a strict standard of review:

> First, the regulation or practice in question must further an important or substantial governmental in-

> terest unrelated to the suppression of expression . . . Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. Thus a restriction on inmate correspondence that furthers an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad. [*Id.* at 413-14.]

The plaintiffs construe this language to require prison officials to use the least restrictive means in regulating areas that implicate the first amendment. In context, however, the broad language is limited. The Court stressed that the regulations at issue applied to correspondence with noninmates: this took the case out of the " 'prisoners' rights' " category and raised "the general problem of incidental restrictions on First Amendment liberties imposed in furtherance of legitimate governmental activities." *Id.* at 408, 409. The Court made the rights of noninmates central to its analysis. *Id.* at 407-09.

When the court squarely addressed the first amendment rights of prisoners later that term in *Pell v. Procunier*, 417 U.S. 817 (1974), its approach was less definitely articulated. The plaintiffs contested regulations prohibiting face-to-face meetings between press representatives and any inmates whom they would specifically name and request to interview. The language of the Court's opinion emphasizes the limited nature of a prisoner's first amendment rights:

> We start with the familiar proposition that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." . . . In the First Amendment context a corollary of this principle is that a prison inmate retains those First Amendment rights that are not inconsistent with his status as a

> prisoner or with the legitimate penological objectives of the corrections system. [*Id.* at 822, quoting *Price v. Johnston*, 334 U.S. 266, 285 (1948).]

The "legitimate penological objectives" referred to – deterrence, rehabilitation, and most important, internal security – are given as the touchstones of first amendment analysis in the prison context. *See id.* at 822-23. The measures necessary to achieve those objectives, the Court says,

> are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters. [*Id.* at 827.]

Thus on the face of it *Pell* is a strong statement in favor of deference to prison administrators' security judgments. The opinion, however, also warns that "[c]ourts cannot . . . abdicate their constitutional responsibility to delineate and protect fundamental liberties." *Id.* Moreover, the holding ultimately rests on a relatively narrow ground: the Court found the restriction on interviews minimal in light of the many avenues of communication open to inmates, including ways to communicate with the press. *Id.* at 823-28. The analysis thus evokes the *Martinez* principle that limitations on first amendment freedoms must be "no greater than necessary or essential," 416 U.S. at 413.

The side of *Pell* which stresses deference to prison administrators has dominated subsequent opinions. It was applied in *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977), which upheld prohibitions on prisoner union meetings and recruitment. The Court quoted the sections of *Pell* excerpted above, adding that prison officials must be permitted the discretion to prevent violence

at early stages. *Id.* at 132-33.[15] It did not limit its analysis to freedom of association cases: freedom of association, the Court said, was merely "the most obvious of the First Amendment rights that are necessarily curtailed by confinement." *Id.* at 125. The regulations were upheld because they were "rationally related" to prison security. *Id.* at 129. To similar effect is *Bell v. Wolfish*, 441 U.S. 520 (1979), which reiterates the proposition that absent "substantial evidence" of an "exaggerated" response to security concerns, the judgments of prison administrators should be upheld. *Id.* at 548. The opinion instructs courts to give "wide-ranging deference" to wardens in security matters. *Id.* at 547.

Thus the first amendment claims of the prisoners in this action are governed by two sets of authorities: *Martinez* on the one hand, and the *Pell* line of cases on the other. *Martinez* applies to the regulations on subjects where the rights of prisoners and non-prisoners are "inextricably meshed," 416 U.S. at 409; that is, the correspondence regulations except for the rule on prisoner-to-prisoner correspondence.[16] Those regulations must be "necessary or essential" to further security interests. *Id.* at 413. The court has found as a matter of fact that the regulations meet that standard, except for certain rules concerning rejection of mail and placement on restricted lists.

The *Pell* line of cases applies to the remaining rules. Those cases require the Bureau to articulate a relationship between its regulations (and practices) and legitimate pen-

[15] "Responsible prison officials must be permitted to take reasonable steps to forestall such a threat, and they must be permitted to act before the time when they can compile a dossier on the eve of a riot."

[16] The publications regulations are not governed by *Martinez* because the rights of publishers are not "inextricably meshed" with those of inmates. *See Pell v. Procunier*, 417 U.S. 817 (1974) (rights of inmates and reporters treated separately).

ological objectives such as internal security. Once the Bureau meets that requirement, the plaintiffs must show by "substantial evidence" that the defendants have "exaggerated their response" to the problems the regulations address. *See Bradbury v. Wainwright*, 718 F.2d 1538, 1541-43 (11th Cir. 1983); *Otey v. Best*, 680 F.2d 1231, 1233 (8th Cir. 1982); *St. Claire v. Cuyler*, 634 F.2d 109, 114 (3rd Cir. 1980). In its findings of fact the court has applied this legal framework to the policies and practices not governed by *Martinez* and concluded that they must be upheld.

The fact the publishers join in challenging these regulations does not change this result. Cases have long rejected the assertion that "people who want to propagandize . . . views have a constitutional right to do so whenever and however and wherever they please." *Adderly* [*sic*] v. Florida, 385 U.S. 39, 48 (1966) (upholding convictions of demonstrators for trespassing on jail grounds). It is a "reasonable time, place, and manner restriction" on expression, *Clark v. Community for Creative Non-Violence*, 104 S. Ct. 3065, 3069 (1984), to limit the mailing of prisoner union and similar potentially volatile publications into a penitentiary – especially where there is no blanket ban on the publications but case-by-case determination of their admissibility.

The *Pell* approach also applies to the plaintiffs' due process claims. *See Wolfish*, 441 U.S. at 544-48; *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974). The court has evaluated the procedures for rejection of publications under this analysis and found them satisfactory. The same result obtains in the correspondence area: given the provisions for notice of adverse action and the right to appeal, there are sufficient procedures surrounding the exercise of the warden's authority. Finally, the sole sixth amendment claim concerns inspection of attorney mail. The court finds no distinction between this claim and the one rejected

in *McDonnell*, except that the defendants in this case produced evidence that mail from attorneys has actually led to breaches of security. The sixth amendment claim therefore must be rejected.

III. ***Conclusion***

The plaintiffs have not shown that the defendants' current policies and practices regarding incoming publications violate the Constitution. They have shown, however, that certain regulations concerning inmate correspondence violate the first amendment. An appropriate order will issue.

/s/ WILLIAM B. BRYANT
William B. Bryant
United States District Judge

Date: September 13, 1984

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 73-1047

JACK ABBOTT, ET AL., PLAINTIFFS

v.

ELLIOT L. RICHARDSON, ET AL., DEFENDANTS

[Filed Sep. 13, 1984]

ORDER

In accordance with the accompanying Memorandum Opinion it is hereby

ORDERED that the defendants and their agents and successors are permanently enjoined from enforcing or applying the regulations now published at 28 C.F.R. §§ 540.13(a), 540.14(a)(2), 540.14(a)(6), and 540.14(a)(7); and further

ORDERED that in all other respects judgment is entered for the defendants.

/s/ WILLIAM B. BRYANT
William B. Bryant
United States District Judge

Date: September 13, 1984

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5718
Civil Action No. 73-01047

JACK ABBOTT, ET AL., APPELLANTS

v.

EDWIN MEESE, III,
ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Filed July 28, 1987]

JUDGMENT

Before: EDWARDS and RUTH B. GINSBURG, Circuit Judges, and FAIRCHILD, Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit.*

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in this cause is hereby affirmed in part, reversed in part, and this case is

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

remanded, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For The Court:

/s/ GEORGE A. FISHER
George A Fisher, Clerk

Date: July 28, 1987
Opinion for the Court filed by Senior Circuit Judge FAIRCHILD.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5718

JACK ABBOTT, ET AL.

v.

ELLIOT L. RICHARDSON, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

[Filed Oct. 13, 1987]

ORDER

Before: EDWARDS and RUTH B. GINSBURG, Circuit Judges, and FAIRCHILD*, Senior Circuit Judge, U.S. Court of Appeals for the Seventh Circuit.

Upon consideration of appellees' petition for rehearing, filed September 11, 1987, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

For The Court:
George A. Fisher, Clerk

BY: /s/ ROBERT A. BONNER
Robert A. Bonner
Deputy Clerk

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* Sitting pursuant to 28 U.S.C. § 294(d).

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